

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

AUG 14 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0107-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
PATRICK ALLEN RUNDHAUG,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-67313

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Doug Clark

Tucson  
Attorneys for Respondent

DiCampli, Elsberry & Hunley, LLC  
By Anne Elsberry

Tucson  
Attorneys for Petitioner

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B R A M M E R, Judge.

¶1 Petitioner Patrick Allen Rundhaug was charged in a seventeen-count indictment with multiple crimes, including theft, criminal impersonation, forgery, and fraudulent scheme and artifice. Pursuant to a plea agreement, he was convicted of one count each of fraudulent scheme and artifice and theft. The trial court suspended the imposition of sentence and imposed a stipulated term of seven years' probation. The state subsequently filed a petition to revoke probation. After Rundhaug admitted several of the allegations therein, the court revoked probation and sentenced him to consecutive, aggravated terms of ten and two years' imprisonment respectively for the convictions. Rundhaug thereafter filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. In this petition for review, he challenges the court's ruling granting partial relief. We review the ruling for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 As he did below, Rundhaug contends his prison sentences were illegally imposed because his term of probation had ended before the petition to revoke probation had been filed. The trial court agreed with him regarding his probationary term for the theft conviction and vacated the prison term for that offense.<sup>1</sup> But the court found the

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<sup>1</sup>The trial court appears to have based its determination on a belief that it had imposed a three-year term of probation for the theft conviction to be served concurrently with a seven-year term of probation for the fraudulent scheme and artifice conviction. We have found no support in the record before us for that belief. Both the transcript and the minute entry order from the June 2000 sentencing hearing refer to a single, seven-year probationary period for both convictions. But the state has not filed a cross-petition for review challenging the court's order granting partial relief and vacating the sentence for the theft conviction. We therefore do not address whether Rundhaug was entitled to the relief granted. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

probationary term for the fraud conviction had not yet expired when the petition to revoke probation was filed and denied relief as to that count. On review, Rundhaug acknowledges his seven-year probationary term had commenced on June 14, 2000, and that the petition to revoke probation was filed before June 14, 2007. He bases his contention that his probationary period had ended on a statement the court made on April 23, 2001, at a sentencing hearing on three separate matters. At that time, the court purported to toll Rundhaug's probation in the underlying case for the period of his incarceration it had imposed on the other convictions and ordered Rundhaug to serve "the balance of the probationary period of six years and 32 days" following his release.<sup>2</sup> The court's written order, however, stated that the balance of Rundhaug's probationary period was "six years and 52 days." Based on the court's oral statement, Rundhaug concludes his probationary period "should have ended on or about May 25, 2007," approximately one week before the petition to revoke probation was filed.

¶3 Generally, when there is "an inconsistency between the written judgment of conviction and the oral sentence . . . the oral pronouncement would control." *State v.*

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<sup>2</sup>In response to the petition for review, the state asserts it was unable to locate this quote. In his petition for review, Rundhaug did not cite the record location for the trial court's statement, and we remind counsel of her obligation to include cites to the record for all statements of fact in the petition. *See* Ariz. R. Crim. P. 32.5. Although in this instance we found the court's statement in a transcript filed in the record on the petition for post-conviction relief on the other matters mentioned above, we had no obligation to search that record and may disregard unsupported statements of fact in the future. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in [the record].").

*Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972). But the trial court’s statement regarding the balance of Rundhaug’s probationary period was not a pronouncement of sentence in this case. And we agree with the state that, given the court’s purpose in attempting to toll the probationary period “was to insure a longer period of supervision of [Rundhaug], not a shorter one,” the court’s statement merely reflected an error in calculation. *See State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (finding sufficient evidence in record trial court intended to impose consecutive sentences as stated in sentencing minute entry, although court orally pronounced sentences would be concurrent). More importantly, the statement did not change the term of Rundhaug’s probation. In our memorandum decision denying relief on Rundhaug’s petition for review regarding the other matters mentioned above, this court determined that the trial court had “lacked jurisdiction” in that sentencing proceeding to toll his probation in this case and vacated the court’s order attempting to do so. *State v. Rundhaug*, No. 2 CA-CR 2002-0068-PR, ¶ 3 (memorandum decision filed May 20, 2003). Without jurisdiction over Rundhaug’s probation, the court’s statement could have had no effect. Therefore, in denying relief on that portion of Rundhaug’s current petition for post-conviction relief, the court correctly found that Rundhaug’s probationary period had not ended before the petition to revoke probation was filed.

¶4 Rundhaug also asserts that, “[i]n the event [his] probation continued beyond May 25, 2007,” the trial court erred in imposing aggravated prison terms. The court found

the following aggravating circumstances: (1) the fact that Rundhaug had committed the offenses while on probation for a prior conviction and (2) the prior conviction itself. On review, Rundhaug contends the court “did not make clear” which conviction it had found as a prior conviction and appears to have “confused the timeline of [Rundhaug’s multiple] convictions.” The record, however, belies that contention. Only one prior conviction had been alleged in the indictment, and Rundhaug admitted that same prior conviction in compliance with his plea agreement. Moreover, the court made it clear, when it had the chance to consider the arguments in the Rule 32 proceeding, which conviction it had considered at sentencing, noting it by its cause number, CR-9404664A.

¶5 Rundhaug also claims “[t]he offenses charged in [this case] were not necessarily committed while [Rundhaug] was on probation in CR-9404664A.” But the trial court found to the contrary in denying post-conviction relief, and its finding is supported by the record. According to the presentence report, Rundhaug was placed on probation in the prior case on June 12, 1995, for a period of three years and successfully completed that probation on June 12, 1998. He was convicted of fraudulent scheme and artifice in this case for actions beginning in April 1995 and continuing through approximately August 14, 1998. Thus, Rundhaug was on probation for the prior conviction for all but a few months of the over three-year period in which he conducted his fraud.

¶6 Finally, Rundhaug claims the trial court was prohibited from considering the fact that he was on probation during the commission of this offense under *Blakely v.*

*Washington*, 542 U.S. 296 (2004), because that fact was not alleged in the indictment. “*Blakely* applies to all convictions not yet final on direct review the day *Blakely* was decided . . . .” *State v. Ward*, 211 Ariz. 158, ¶ 10, 118 P.3d 1122, 1126 (App. 2005). Although Rundhaug’s sentence was imposed after *Blakely* was decided, his conviction was final well before that date. *See State v. Febles*, 210 Ariz. 589, ¶ 9, 115 P.3d 629, 632 (App. 2005) (“A conviction is final when ‘a judgment of conviction has [been] rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.’”), *quoting State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003). The court did not directly address *Blakely* in its ruling on post-conviction relief, but even assuming *Blakely* applied to Rundhaug’s sentencing proceeding, there was no sentencing error. As Rundhaug concedes, the court properly considered Rundhaug’s prior conviction. *See Blakely*, 542 U.S. at 301 (exempting fact of prior conviction from rule that jury must determine facts that increase sentence above statutory maximum). And our supreme court has held that once a single *Blakely*-compliant or -exempt factor has been found, a court may find additional facts relevant to its determination of “the specific sentence to impose on a defendant within a given statutory sentencing range . . . by a preponderance of the evidence.” *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005) (emphasis removed).

¶7 Because the trial court did not err in determining Rundhaug’s probationary period had not expired for his conviction of fraudulent scheme and artifice when the petition to revoke probation was filed or in imposing an aggravated sentence in this case on that

count, it did not abuse its discretion by denying post-conviction relief based on Rundhaug's contention that his sentence for the fraudulent scheme and artifice conviction was illegal. Although we grant Rundhaug's petition for review, we deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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PHILIP G. ESPINOSA, Judge